IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-1575

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,

Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ILLINOIS, IOWA, KENTUCKY, LOUISIANA, NEBRASKA, PENNSYLVANIA AND WISCONSIN

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ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,

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BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONER DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTEREST OF THE AMICI CURIAE

The State of Indiana, through the Attorney General submits this brief as amici curiae in support of the petition for a writ of certiorari sought by the Department of Banking of Consumer Finance of the State of Mississippi in the above captioned matter. The State of Indiana administers state chartered financial institutions within its jurisdiction. The State of Indiana's primary job is to promote the safety and soundness of the

financial institutions for the welfare of its citizen. In the view of the State of Indiana and amici states, the decision of the Court of Appeals in the present case, if allowed to stand, will cause substantial and unnecessary confusion as to how a national bank can branch in a state. Because of the importance of clarifying the role of the definition of branching, the State of Indiana and amici states respectfully pray that the petition for certiorari be granted.

STATEMENT OF THE CASE

This case arises out of a decision by the Comptroller of the Currency to permit Deposit Guaranty National Bank of Jackson, Mississippi ("Deposit Guaranty") to establish a branch in Gulfport, Mississippi. National banks under federal law are permitted to branch in a state only to the extent that state law in the state permits state banks to branch. This requirement was established by the McFadden Act of 1927, codified in the National Bank Act at 12 U.S.C. §36 ("The McFadden Act"), which says in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language, specifically granting such authority and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. §36(c) (1952). This Court has held that the purpose of this statutory provision is to "place national and state banks on a basis of 'competitive equality' insofar as branch banking [is] concerned." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

The Comptroller's decision recognized that the Mississippi statute governing its state chartered banks, which restricted such branching to within 100 miles of the bank's main office, would preclude the branching requested by Deposit Guaranty

to be located more than 100 miles from its main office. See Miss. Code Ann. §§81-7-5 and 81-7-7 (1972). Under a section of the Mississippi Code relating to the incorporation and regulation of state savings and loan associations, such associations are authorized to branch without a territorial limitation and thus may branch statewide. See Miss. Code Ann. §81-12-175 (Supp. 1986). An application by a national bank located in Indiana and amici state would have approximately the same impact. The definition of "state bank" in Section 36(h) of the McFadden Act reads in pertinent part:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. §36(h) (1927). The Comptroller concluded that this language establishes a federal "functional" definition of "state bank" and under that definition, savings and loans in Mississippi compete to some extent with banks. The Comptroller concluded that Mississippi savings and loans offer certain services in competition with commercial banks thus such conduct is sufficient to bring them into the "business of banking."

The Comptroller concluded that the McFadden Act permits a national bank to branch to the extent that Mississippi allowed branching by state savings and loans, i.e., without geographic restrictions, and, on July 9, 1985, the Comptroller gave Deposit Guaranty approval to open the requested branch in Gulfport.

If the Court of Appeals decision were to stand, the impact on Indiana and amici states' financial institutions would be greatly changed. National banks located in central Indiana would have more branching capability than state-chartered banks. The state legislature would also have to amend the powers of State chartered savings and loans to allow them to branch state wide. As the law in Indiana presently exist, national banks would be allowed to literally branch state wide under this decision. Competitive equality and the dual system of banking would suffer a

severe blow. State chartered banks would therefore want to convert their state charters for a federal charter.

Branching under the Comptroller's decision permits national bank to engage in acts that would not have been permissible for any of Mississippi's state-chartered banks. Thus, Mississippi state-chartered banks would be at competitive disadvantage. This outcome is what McFadden Act was intended to preclude.

The Department of Banking and Consumer Finance of the State of Mississippi brought this action against the Comptroller and Deposit Guaranty in the federal district court for the Southern District of Mississippi, challenging the Comptroller's decision under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* The action was brought for a declaratory judgment that the Comptroller's decision was unlawful, and therefore null and void. Preliminary and permanent injunctive relief prohibiting the Comptroller from issuing a certificate of authority for the proposed branch was also sought.

The District Court entered final judgment for The Mississippi Department and issued a permanent injunction. The Comptroller appealed to the Fifth Circuit Court of Appeals.

The Department of Banking and Consumer Finance of the State of Mississippi represented by the Mississippi Attorney General contends that the Comptroller is ignoring the express language of Sections 36(c) and 36(h) of the McFadden Act. These sections incorporate state law. The Comptroller's and the Court of Appeals decision ignores congressional intent, besides destroying competitive equality between state and national banks in the matter of branching. Section 36(h) defines "State bank" to include only those "institutions carrying on the banking business under the authority of State law." Savings and loan associations do not fall under the provision of Mississippi law governing the chartering and operating of state-chartered banks. See Miss. Code Ann. §81-7-1 *et seq.* (1972). Indiana and the amici states have similar statutory provisions. In addition, state savings and loans are subject to limitations that are not applicable to commercial banks. See Miss. Code Ann. §81-12-1

et seq. (Supp. 1986). Indiana and the amici states also have similar statutory provisions. In the absence of any reference to savings and loans in the McFadden Act or in the legislative history dealing with the branching restrictions of the Act, congressional intent has always been that savings and loans be treated separately from banks. Neither the language of the McFadden Act nor its legislative history provide support from the proposition that Congress ever intended competitive inequality between state banks and national banks in the matter of branching.

In 1933, Congress amended the McFadden Act when it passed the Banking Act of 1933. The Home Owners' Loan Act of 1933, codified at 12 U.S.C. §§1461-1470 authorized the establishment of federal savings and loans. Neither statute indicated any interrelationship between the branching activities of the two types of institutions. Branching of savings and loans has been determined to be an implied power in the statute. *North Arlington Nat'l Bank v. Kearney Federal Savings & Loan Ass'n*, 187 F.2d 564 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951); *First Nat'l Bank of McKeesport v. First Federal Savings & Loan Ass'n of Homestead*, 225 F.2d 33, 35 (D.C. Cir. 1955). Banks do not have the right to protest savings and loan branching on the grounds that they compete with those institutions *Union Nat'l Bank of Clarksburg v. Home Loan Bank Board*, 233 F.2d 695 (D.C. Cir. 1956).

There is no evidence of congressional intent to link the branching authority of federal and state savings and loan associations, much less the branching authority of such associations to banks. Historically there has been separate treatment of banks and savings and loans. Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. §§1461 et *seq.* while expanding the powers of federal savings and loans, continued to significantly circumscribe the powers of savings and loans in comparison to the powers of banks and to maintain the traditional differences between banks and savings and loans.

In anticipation of Garn-St. Germain, Mississippi enacted a law that automatically expands the powers of Mississippi sav-

ings and loans with the expanded powers of federal savings and loans. Miss. Code Ann. §81-12-49(r) (Supp. 1986). The powers of savings and loans continue to be restricted, in comparison to banks. The Garn-St. Germain Act was intended "to provide additional asset flexibility and earnings opportunities to thrift institutions in the long-term by limiting such powers. The Garn-St. Germain Act maintains the traditional distinctions between commercial banks and thrift institutions." 128 Cong. Rec. S12213 (daily ed. Sept. 24, 1982).

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE COURT OF APPEALS IS CONTRARY TO HOLDINGS OF THIS COURT

This Court has already addressed the issue of the extent to which state law should be applied in determining whether a national bank may engage in branch banking under the McFadden Act.

The Comptroller in *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 87 S.Ct. 492 (1966), as in this case, argues that a national bank is not confined by state branching restrictions. The Comptroller contended that since the state permitted branching by banks by taking over an existing bank, a national bank could branch. Under the Comptroller's view of the McFadden Act, state law governs only "whether" and "where" branches may be located. The McFadden Act does not set forth the "method" of branching. This Court rejected the Comptroller's selective use of the state statute and held that "[i]t is a strange argument that permits one to pick and choose what portion of the law binds him" (*id.* at 261). This Court also held that restrictions that are part and parcel of the state law governing branching are "absorbed by the provisions of §§36(c)(1) and (2) . . ." of the McFadden Act and that when a state expresses the conditions under which it will permit branching, "it expresses as much 'whether' and 'where' a branch may be located" as when it states an explicit geographic prohibition, *Id.* at 261-262. This Court concluded,

by holding that the McFadden Act has a clear-cut purpose of achieving "competitive equality" in branch banking. *Id.* at 261. This applies to financial institutions in Mississippi, Indiana and other amici states.

The decision below rests precisely upon the kind of selective use of state banking statutes that this Court found impermissible in *Walker*.

The Comptroller in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337 (1969) dealt with the issue of whether an armored car messenger service and other off-premises receptacles used by a national bank in Florida for the receipt of packages containing cash or checks for deposit constituted branch banks under the definition of a branch in Section 36(f) of the McFadden Act, 12 U.S.C. §36(f) (1927). The Comptroller, approved the national bank's use of off-premises receptacles, placing Florida state banks at a competitive disadvantage to national banks. Florida laws prohibited such branching by state banks. *Id.* at 124-25, 130-31, 138. This Court held that Section 36(f) of the McFadden Act makes no reference to state law and that the federal definition in that section was to be applied in a manner that would implement the underlying purpose of the branching requirements to assure competitive equality and preserve the dual system of banking. The *Walker* Court emphasized that "the congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." 396 U.S. at 138. This is precisely what has occurred in Mississippi and will occur in Indiana, and other similarily situated amici states if the Fifth Circuits decision stands.

The decision below is also in conflict with decisions of two district courts. In *State Chartered Banks in Washington v. Peoples Nat'l Bank of Washington*, 291 F. Supp. 180, 198-99 (W.D. Wash. 1966) the court held that a national bank could not take advantage of the branching privileges afforded state-chartered mutual savings banks, unless it met all of the requirements of the state statute governing mutual savings

banks. In *First Nat'l Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C (E.D. Okla. Nov. 15, 1982 and Dec. 17, 1982), trust companies are considered separate and distinct creations from state banks, not chartered as state banks, and not carrying on the banking business under authority of state law.

II. IF ALLOWED TO STAND, THE HOLDING OF THE COURT OF APPEALS WILL BE IN CONFLICT WITH THE DECISIONS OF TWO OTHER FEDERAL COURTS OF APPEALS

Both the Eighth and Ninth Circuits have held that the McFadden Act prohibits national banks from branching in a state to a greater degree than the state-chartered banks in that state. This also applies to the branching authority granted to other state financial institutions. The Fifth Circuit decision is in direct conflict with these decisions. The Eighth and Ninth Circuits' decisions are the benchmark of branching powers of all financial institutions.

The Comptroller in *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979), approved a relocation of a national bank branch in Washington state. The district court determined that a state-chartered bank would be prohibited from doing this. The Comptroller applied and relied on the same arguments presented by respondents in this case. Those arguments provide that even if state-chartered banks are precluded from such branching, national banks are not. *Id.* at 279. The Ninth Circuit held that the state law governing mutual savings banks in Washington did not provide a basis for national bank branch relocation. *Id.* at 279-80.

The reasoning from *Mutschler* is directly applicable here and puts the Ninth Circuit squarely at odds with the Fifth Circuit decision. The Ninth Circuit concluded that the references to state law in Sections 36(c) and 36(h) of the McFadden Act require that state law be used to determine the definition of "state bank." *Id.* at 279. A mutual savings bank, under Wash-

ington state law, is not a "state bank" therefore, the branching permitted Washington state mutual savings banks could not be used to justify branching by a national bank. *Id.* at 279-80. Even if a mutual savings bank in Washington were classified to be a "state bank," for purposes of the McFadden Act, the requirement of Section 36(c) of the McFadden Act that national bank branching rights are "subject to the restrictions as to location imposed by the law of the State on State banks" would prohibit a national bank from a branching as much as a mutual savings bank. An exception to this would be, if a national bank satisfied all of the provisions of the state statute governing mutual savings banks. *Id.* at 280. In order to branch, a national bank, like a state-chartered institution, would also have to meet the requirements imposed on a mutual savings bank.

In *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977), the Comptroller determined that a national bank was able to engage in branching under state law. The Comptroller held that the Bank of North Dakota, a state-owned bank, had no branching restrictions. The Eighth Circuit decided that Section 36(h) of the McFadden Act does not permit a national bank to branch in reliance on the branching privileges enjoyed by the state itself in its banking endeavors, when such branching is prohibited for private state-chartered banks. To hold otherwise, would be inimical to the policy of competitive equality and the dual system of banking between banks. *Id.* at 356.

III. THE QUESTION INVOLVED HAS A MAJOR IMPACT ON THE DUAL SYSTEM OF BANKING AND COMPETITIVE EQUALITY IN MISSISSIPPI, INDIANA, AS WELL AS, IN OTHER AMICI JURISDICTIONS

Indiana state-chartered banks under this holding, as well as, amici states would be subjected to competition from national banks with broader branching privileges. To prevent inequity in Mississippi, Indiana and other amici states similarily situ-

ated, the state legislature would be forced to expand branching privileges for state-chartered banks and state-chartered savings and loans. The McFadden Act has never intended to be construed expansively to accommodate national banks.

The Comptroller's unjustifiably expansive interpretation of the McFadden Act, has already been rejected in four previous cases. If the decision of the court below stands, there is potential to impose sweeping change in the nature of banking in Mississippi, Indiana and the amici states. This would be accomplished by administrative fiat. Thus state-chartered banks would be at a competitive disadvantage and would be compelled to convert their charter in order to make profits and stay competitive, unless the states bent to the Comptroller's will regarding branching rights. The theories of competitive equality and the dual system of banking would become dinosaurs.

This Court in *Clarke v. Securities Industry Association*, _____ U.S. _____, 107 S.Ct. 750, 764 n.3 (1987) refused to allow the Comptroller's "systematic attempt to secure for national banks branching privileges [a state] denies to competing state banks." This is the exact same issue in the case at bar.

The "dual banking system", as it exists in the United States today, is the historical outgrowth of more than a century of evolving bank regulation by the federal and state governments. *Wilmarth, The Case for the Validity of State Regional Banking Laws*, 18 Loy. A.L. Rev., 1017, 1020-34 (1985).

Between President Jackson's 1832 veto of the bill to renew the charter of the Second National Bank, and the Civil War, there were no national banks in the United States. By the passage of the National Currency Act of 1863 and the National Bank Act of 1864, Congress re-established national banks and gave them the sole power to issue currency, but until the passage of the Federal Reserve Act in 1913, did the federal and state governments operated completely separate and independent banking systems.

With the enactment of the Federal Reserve Act, bank supervisory powers of the federal and state governments began to

overlap. Today, state banks are subject to the laws of the states in which they are chartered, besides provisions of the Federal Reserve Act and other federal laws. Even those state banks which choose not to become members of the Federal Reserve System are still subject to the Federal Reserve Board's reserve-setting power under the Depository Institutions Deregulation and Monetary Control Act of 1980 Act of Mar. 31, 1980, Title I, Pub. L. No. 96-221, 94 Stat. 132 (amending 12 U.S.C. Section 461). Moreover any state nonmember bank which elects to obtain federal deposit insurance, as virtually all commercial banks do, becomes subject to the provisions of the Federal Deposit Insurance Act. 12 U.S.C. Sections 1811-32.

The constitutionality of federal regulation of state banks by the Federal Reserve Board in *Hiatt v. United States*, 4 F.2d 375 (7th Cir. 1924), *cert. denied*, 268 U.S. 704 (1925), as well as, by the Federal Deposit Insurance Corporation ("FDIC") in *Doherty v. United States*, 94 F.2d 495 (8th Cir. 1938) has been sustained on the grounds that membership and insurance are voluntary, and that a bank electing to accept the benefits of either may be required to accept regulatory controls.

Despite the increase in the power of the federal government over state banks since 1913, the essential outlines of the dual system of banking remains clearly discernible. The entry process, still is handled on a separate basis by the respective chartering authorities of the state and federal governments. Once having obtained a charter from one system, a bank may elect to convert to the other system to adjust to changing circumstances. The result has been one of the most flexible and best designed banking regulatory patterns in the world. If the Fifth Circuit's decision stands this would be destroyed.

Whatever may be the history of Federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the First National Bank Act of 1863, *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). The dual system offers at least three advantages which would not be available under a system that concentrated all charter-

ing and supervisory powers in a single agency. First, the provision for alternative routes of entry avoids, to a large extent, the possibility that a meritorious application will be rejected, either because of a mistake in appraising the prospects of or the need for a new bank, or because existing banks have mustered sufficient pressure to block the issuance of a new charter. Second, the provision for alternative supervisory schemes offers banks an opportunity to select a system which best satisfies their business needs. Third, the dual banking system requires both federal and state regulators.

In *Commercial Security Bank v. Saxon*, 236 F. Supp. 457, 460 (D.D.C. 1964), *aff'd sub nom. First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). *See also First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 130-34 (1969), the Court held:

> It seems clear to the Court that in order for the 'dual banking system' of the United States, consisting of state chartered banks and national banks, chartered under the National Bank Act of 1864 . . . , to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

The dual banking system depends for its continued existence upon the principle of equality. The Comptroller's decision in this instances, rather the states, establishes the conditions under which state banks can compete with national banks.

Thus, the continued vitality of dual banking is dependent upon the existence of a basic competitive balance or competitive equality on a "level playing field". All banks must be afforded approximately the same measure of operation. Clearly, if either of the two basic chartering systems were to offer substantially more liberal rights and privileges than the other, underprivileged banks would quickly convert to the more generous system, leaving the other system an empty

shell. Thus, the Fifth Circuit's decision would be contrary to the historic congressional commitment to the preservation of competitive equality between federal and state chartered banks. The Fifth Circuit's decision threatens to upset the desired balance between state and national banks, as well as, the entire banking structure of the nation and over one hundred years of tradition.

CONCLUSION

For the foregoing reasons, it is respectfully submittd that the petition for writ of certiorari should be granted.

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